

BLACK HILLS POWER & LIGHT CO.

IBLA 82-1014

Decided May 26, 1983

Appeal from decision of the Montana State Office, Bureau of Land Management, setting annual rental for powerline right-of-way M-071094 (SD).

Set aside and remanded.

1. Appraisals -- Rights-of-Way: Generally -- Rights-of-Way: Act of February 15, 1901

An appraisal of a right-of-way for a powerline will be upheld where no error is shown in the appraisal method used by the Bureau of Land Management. Where, however, sufficient doubt exists as to the validity of BLM's determination, the case may be remanded to the Bureau to reconsider whether a further appraisal or adjustment in the appraisal value should be made.

APPEARANCES: Portia K. Brown, Esq., Rapid City, South Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

This appeal is taken from a decision dated May 24, 1982, by the Montana State Office, Bureau of Land Management (BLM), setting \$314 as annual rental for powerline right-of-way M-071094 (SD) for the period November 22, 1982, through November 21, 1987.

Appellant's right-of-way for a 12 kv distribution line was granted on November 22, 1965, pursuant to the Act of February 15, 1901 (43 U.S.C. § 959 (1976)). The right-of-way crosses public lands in T. 5 N., R. 5 E., Black Hills meridian, secs. 1, 2, 3, and 10 within the Fort Meade Military Reservation. On the date of the grant the rental was \$25 for 5 years. In 1970 BLM revised the rental to \$34 for the next 5 years. On July 14, 1975, the rental was raised to \$47 annually or a lump sum payment of \$193 for 5 years. On September 4, 1980, appellant was advised that its right-of-way was subject to reappraisal, but was informed that until the reappraisal was completed it would be billed at the rate of \$47 per annum. By notice dated June 29, 1981, BLM advised appellant that beginning in November 1981 the new charge would be \$314 per year.

When appellant asked BLM to reconsider this charge, BLM replied that one of the most important reasons for the increase was the change in the highest and best use of the land crossed by the powerline:

In the 1965, 1970, and 1975 appraisals, the highest and best use of the subject property was determined to be for livestock grazing. However, even by 1975, some major changes were taking place on the lands adjoining Fort Meade. Several tracts of land were subdivided for rural homesites. Lot sales were good, and many quality homes were built. One of the better subdivisions adjoins the subject property, just to the west. In spite of the nearby subdivision activity and the physical adaptability of the subject land to subdivision, the land was appraised as grazing land due to the Fort Meade military withdrawal order. Then, in 1979, our Denver Service Center conducted a review of our appraisal program. One of the findings of that review was that where rights-of-way cross withdrawn land, they should be appraised as though the withdrawal does not exist. As a result, your right-of-way was appraised in 1980 with a highest and best use of wholesale subdivision land.

(BLM letter dated Aug. 3, 1981). BLM's appraisal was in accordance with instructions from BLM's Denver Federal Center (Gov't Exh. 4 at 3). A November 18, 1981, memorandum from the Center's director to the Montana State Director reaffirmed these instructions stating in part as follows:

The [Fort Meade] military withdrawal is a self-imposed restriction. It is not comparable to a zoning restriction imposed by external authority. The Government could decide to discontinue military use and sell the lands for subdivision purposes as long as this would be consistent with the zoning and regulations that would apply to any other landowner in the area. Speculation as to if and when such a management decision would be made has no bearing on the appraisal problem. [Emphasis in original.]

On November 30, 1981, BLM rescinded the increased rental rate for the period November 1981 to November 1982 and allowed appellant the opportunity to request a hearing on the proposed increase. Pursuant to appellant's request, a hearing was held with BLM officials in Billings, Montana, on March 24, 1982.

At the hearing appellant's vice president said that he had no qualms with BLM's appraisal and conceded that if the property were available for subdivision BLM's valuation of \$314 would be appropriate. He thought, however, that the highest and best use of the property was grazing.

BLM's appraiser stated that his instructions were to appraise the property as if the Fort Meade withdrawal did not exist (Tr. 23, 27). Both the appraiser and BLM's chief appraiser stated that present actual use of the lands was grazing (Tr. 31, 37).

Appellant's major challenge on appeal is to the fact that BLM's appraisal ignores the Fort Meade withdrawal. While appellant "does not

dispute that the highest and best use * * * may be for subdivision purposes" it points out that the land is withdrawn with no indication that its status will change, and that its present and foreseeable use will be as grazing land. Appellant also states that if the property were to be subdivided, the developer would be required to dedicate powerline easements with the result that appellant would pay nothing for its right-of-way and would benefit by obtaining more customers.

[1] The general standard for reviewing rights-of-way appraisals is to uphold the appraisals if there is no error in the appraisal methods used by BLM or the appellant fails to show by convincing evidence that the charges are excessive. Western Slope Gas Co., 61 IBLA 57 (1981); Full Circle, Inc., 35 IBLA 325, 85 I.D. 207 (1978). Generally, in the absence of compelling evidence that a BLM appraisal is erroneous such an appraisal may be rebutted only by another appraisal or appraisals. James W. Smith, 46 IBLA 233, 235 (1980).

The question before us is whether BLM properly disregarded the Fort Meade withdrawal in making its appraisal. Highest and best use is defined in the Uniform Appraisal Standards for Federal Land Acquisitions (1973) at page 7:

By highest and best use is meant either some existing use on the date of taking, or one which the evidence shows was so reasonably likely in the near future that the availability of the property for that use would have affected its market price on the date of taking and would have been taken into account by a purchaser under fair market conditions. [Emphasis added.]

See Olson v. United States, 292 U.S. 246, 255 (1934). Uniform Appraisal Standards further states at page 7:

Many things must be considered in determining the highest and best use of the property including: supply and demand, competitive properties; use conformity; size of the land and possible economic type and size of structures or improvements which may be placed thereon; zoning; building restrictions; neighborhood or vicinity trends.

In our view the record herein demonstrates no reasonable likelihood of the availability of the property for wholesale subdivision in the near future. That the Government could decide to discontinue military use and sell the lands for subdivision, is, without more, a speculative or conjectural possibility whose opposite is equally valid. Moreover, the Denver Service Center's distinction between a military withdrawal and a zoning restriction on the basis that a military withdrawal is self imposed appears to be a tenuous rationale upon which to base the instruction to appraise as if no withdrawal existed. A zoning ordinance and a withdrawal are both governmental restrictions placed upon the use of the land. Both are restrictions on the use of the land by the governmental body imposing the restrictions and both restrict the use of the land by private parties. In fact, zoning ordinances are probably more easily revoked or changed than military withdrawals. See 43 U.S.C. Subchapter II (1976). Either of the two circumstances, zoning restriction or

withdrawal, limits, restricts or defines in some manner the way the land may be used. Thus, the pivotal consideration is not so much the authority by which the encumbrance exists but the probability that the encumbrance may be lifted. To the extent that such probability can be demonstrated it can be reflected in fair market value. See Hinton v. Udall, 364 F.2d 676, 681 (D.C. Cir. 1966); Western Slope Gas Co., 61 IBLA 57 (1981).

There is no evidence in the record that the withdrawn lands might be put to uses other than grazing or that the withdrawal might be lifted in the foreseeable future. In absence thereof, we cannot endorse BLM's instruction to appraise, and its appraisal, as if the withdrawal did not exist. BLM's "Random Review of Appraisals" (Gov't Exh. 2) indicates that BLM's policy prior to 1979 had been to consider the effect of a withdrawal in appraising rights-of-way across withdrawn land. The review recommends: "In the future, where a right-of-way crosses withdrawn land, it should be appraised as though the withdrawal does not exist." The review gives no explanation for this change in policy, nor is any reference made to Departmental or Bureau appraisal standards.

We conclude that sufficient doubt is raised as to the validity of the appraisal, insofar as it ignored the withdrawal, to warrant remanding the case for a determination of the necessity of further appraisal or adjustment of the present appraisal. If BLM wishes to discount the effect of the withdrawal, it should indicate why it believes that the withdrawal may be terminated within the 5-year period to which the reappraisal is applicable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded to the Montana State Office for further action consistent herewith.

R. W. Mullen
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

